in the

Supreme Court
of the
United States

NO. 77-1145

LOUIS VERNELL, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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LOUIS VERNELL
In Pro Se
Executive Building
Miami Springs Villas
500 Deer Run
Miami Springs, Florida 331[illegible]
(305) 871-6565

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The Petitioner, Louis Vernell, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals Fifth Circuit, entered on September 21, 1977. (App. "A"). A timely Petition for Rehearing was denied on November 14, 1977.

OPINION BELOW

The judgment of the Court of Appeals was entered without hearing pursuant to its Local Rule 18 and served to affirm the summary dismissal of a Petition to Vacate Conviction filed pursuant to 28 U.S.C. 2255. The opinion of the Circuit Court is reported at 559 F.2d 963.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1):

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Jurisdiction is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States:

> "Where a court of appeal has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

QUESTION PRESENTED

Where a 28 U.S.C. 2255 Petition to Vacate Conviction alleges grounds sufficient to make requisite the vacating of Petitioner's conviction, i.e.: (1) unauthorized wiretapping; (2) deliberate suppression of exculpatory evidence; and (3), the Government's knowing use of perjurious testimony and false records, are Petitioner's constitutional rights of due process and equal protection under the law violated where such Petition is summarily dismissed without evidentiary hearing, notwithstanding that none of such grounds were ever previously heard or determined on the merits?

RULES AND STATUTES INVOLVED

Title 28 U.S. Code, 2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set

the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention".

STATEMENT

Petitioner, a practicing attorney in the State of Florida for 27 years, was convicted after jury trial in the United States District Court for the Southern District of Florida of the offense(s) of wilfull failure to file income tax returns for the taxable years 1967 through 1971, as proscribed by 26 U.S.C. Section 7203. Upon adjudication, Petitioner was sentenced to concurrent terms of nine months imprisonment and fined $5,000.

Prior to trial, the parties stipulated to all elements of the offense, save for the issue of wilfulness. To negate such singular element, the Petitioner sought to establish that a myriad of circumstances precluded an earlier filing of Petitioner's returns which included the loss and destruction of Petitioner's records; the ill health and repeated "intensive care" hospitalizations of Petitioner's wife; Petitioner's own deteriorated health; his absence from the country; and other matters related to the pressure and requirements of Petitioner's law practice.

Aside from such evidentiary matters, the very *crux* of Petitioner's defense rested on his ability to demonstrate: (1) that Petitioner had, in fact, filed *all* of the required tax returns and fully paid *all* taxes due thereon, almost *one year prior* to the filing of Information in the cause; (2) *that during each of the years charged in the Information, the Petitioner did, in fact, make timely and appropriate application(s) for extension of time to file required returns and that such extensions had been granted to him by the Internal Revenue Service.*

Although the Government conceded all other factual matters presented in Petitioner's defense, it vigorously denied both the filing of Petitioner's applications for extensions of time and/or the granting of the same. Because of the prior loss of Petitioner's records, the Petitioner was unable to establish the filing and/or granting of such extensions, except through his own testimony.

In direct conflict therewith, the Government placed into evidence what it represented were the "complete" records of "all of the transactions" of the Petitioner as well as the testimony of "the personal representative of the District Director", Walter McDaniel. Such records and testimony diametrically conflicted with Petitioner's own sworn testimony. At one point in the trial the Government actually pitted Petitioner's testimony against the McDaniel testimony and records, viz: (App. B).

"Vernell — Cross

Q. Now, you heard the testimony of Mr. McDaniel?

A. Yes, sir.

Q. Have you examined Government Exhibit No. 1 — No. 8?

A. Relative to my extension applications?

Q. Yes, sir.

A. Yes.

Q. They don't show that you filed extensions for all those years, do they?

A. They are incorrect.

Q. You believe they are incorrect?

A. I know they are incorrect."

Aside from the exculpatory effect of such extensions, the dispute concerning the filing and/or granting of the same constituted the sole test of Petitioner's credibility. Absent physical evidence to support Petitioner's sworn testimony, the prohibitive force of the government's "official records" and the testimony of such ranking I.R.S. representative served to fully discredit Petitioner and to otherwise hold him up to ridicule before the jury.

Albeit, the consequential affect of such uneven test of credibility upon the issue of "wilfulness" virtually mandated the adverse verdict rendered.

POST-TRIAL PROCEEDINGS

Petitioner thereafter appealed such conviction to the Fifth Circuit Court of Appeals, raising three specific issues, i.e., (1) Error in the trial Court's instruction to the Jury, (2) prosecutorial misconduct during trial, and (3) the existence of a material variance between the charge and proof adduced. *After* the record and briefs in such cause had been filed, Petitioner discovered an exculpatory exhibit which mysteriously surfaced in the court file following its return from the United States Attorney's office, (App. C). The bizarre circumstances of such discovery are reflected in Petitioner's Affidavit filed before such Court (App. D).

As noted, the subject exhibit consisted of a *copy* of an official IRS transcript reflecting both the filing and granting of at least one, and perhaps the most important, of the tax extensions which formed the basis of the factual dispute at trial.[1]

Although Petitioner immediately advised the Court of Appeals as to his discovery, it was not until *after* the entry of such Court's *summary* dismissal of Petitioner's appeal under Rule 21, 510 F.2d 383, (App. E) that Petitioner filed a motion for remand and Petition for

[1]As a result of the unauthorized service of a subpoena on Petitioner's accountant the day prior to trial and a claimed illegal wiretap, the government knew Petitioner was unable to produce extensions for the years 1967, 1970 and 1971. At trial, the government coincidentally conceded the filing of the extensions possessed by Petitioner, but vigorously denied those which Petitioner was unable to produce. The *crux* of such factual dispute centered on the last of the questioned taxable years, i.e. 1971, the existence of which was subsequently discovered, infra.

Rehearing, therein raising for the first time a collateral issue concerning the consequential effect of the subject exhibit. The Circuit Court *refused* to consider either of such motions and accordingly denied the same, specifically holding as follows: (App. F).

> "Appellant also has filed a motion that the case be remanded for evidentiary hearing. The various grounds asserted are raised for the first time on appeal, on petition for rehearing, or in the motion itself, and we will not consider them. The motion is DENIED."

Despite the complete failure and refusal of the Court to consider such matter *on the merits*, the same Fifth Circuit Court of Appeals based its findings in the case at bar, largely on its contention that it had previously "decided" the issues herein on the basis of such undetermined Petition for Rehearing (App. A).

Following remand of Petitioner's original appeal, Certiorari was thereafter taken to this Honorable Court, raising only two issues for consideration, i.e.: (1) error in the trial court's instruction to the jury, and (2) the existence of a fatal variance between the charge and the proof adduced. Such application was thereafter denied by this Honorable Court, 423 U.S. 1014, 96 S.Ct. 446 (1975).

Albeit, during the pendency of such Certiorari proceeding, the Petitioner filed a Motion for New Trial in the District Court under Rule 33, based on newly discovered evidence (App. G). The District Court *summarily denied* such motion *without evidentiary*

hearing (App. H). No traverse or other response to such motion was ever made by the Government.

Again, and despite the fact that *no determination on the merits* had been rendered by the District Court on such motion, *nor hearing had thereon,* the Court of Appeals in the case at bar *relied upon such District Court denial* as a further basis for its contention that the issues contemplated herein had been "decided". (App. A).

Following such *summary* denial, Petitioner then appealed the District Court action to the Fifth Circuit Court of Appeals which once again entered a *summary* judgment of affirmance without hearing pursuant to its Local Rule 18, 526 F.2d 814 (App. I). In its opinion in the case at bar the Circuit Court erroneously relied upon such *summary* disposal of the appeal as an additional basis for its opinion that the issues contemplated herein had previously been "decided" (App. A).

Albeit, and following affirmance of such *summary* denial of Petitioner's Rule 33 Motion for New Trial, the Petitioner, while incarcerated, filed a Petition to Vacate Conviction under 28 U.S.C. 2255 which vastly *differed* from his prior motion for New Trial in both scope and content (App. J). As noted, rather than relying upon the singular ground of newly discovered evidence, Petitioner alleged innumerable constitutional infirmities in his conviction, based upon his claim of unauthorized wiretapping, deliberate suppression of exculpatory evidence and the Government's knowing use of perjurious testimony and false records.[2] Although the sufficiency of such grounds to warrant the vacating of Petitioner's conviction was never challenged, the District Court nonetheless *summarily* dismissed the Petition without *evidentiary hearing.* (App. K) The Petitioner then filed in the District Court a Motion for Rehearing and for vacation of the Order of dismissal which was likewise *summarily* denied by the District Court without hearing (App. L).

[2]Petitioner further claimed that exculpatory exhibits, *other* than that previously discovered and included in his Rule 33 motion had, likewise, been suppressed by the government.

Following such *summary* dismissal, the Petitioner then appealed *both* the original order of dismissal of the District Court as well as its further Order denying his Motion for Rehearing (App. M). As noted, the opinion of the Circuit Court in the case at bar erroneously suggests that Petitioner's appeal was directed only to the denial of his Motion for Rehearing and Vacation of Order dismissing his 2255 Petition (App. A).

Significantly, and for *the third time,* the Circuit Court entered a *summary* judgment of affirmance without hearing pursuant to Local Rule 18, on this last appeal of Petitioner.

Albeit, and notwithstanding that the Circuit Court in the case at bar based its opinion upon the express ground that the issues contemplated herein had previously been "decided", at no time has any hearing whatsoever been accorded to Petitioner thereon, nor has the Government ever heretofore filed any traverse or other response, either admitting or otherwise denying any of the constitutionally impermissible actions as alleged by Petitioner. Indeed, the record convincingly demonstrates that the *last and only* "hearing" ever accorded to Petitioner since the filing of the original Information in the cause was the trial itself, in which Petitioner's conviction was entered.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court in affirming the District Court's *summary* dismissal of Petitioner's Motion to Vacate Conviction without evidentiary hearing, is in conflict with this Court's decision in *Sanders vs. U.S.* (1963) 373 U.S. 1, and is otherwise repugnant to the statutory requirements of 28 U.S.C. 2255.

At the outset, it should be noted that the *sole* thrust of both the Petition filed before this Honorable Court *and* the appeal taken to the Circuit Court circumscribes Petitioner's claim *that he has thus far been totally deprived of any opportunity or hearing to present for determination on the merits, any of the constitutionally impermissible actions of the Government attendant to Petitioner's conviction.*

Contrary to the opinion rendered by the Circuit Court, *none* of the several grounds urged to vacate Petitioner's conviction have ever been heard or determined on the merits, notwithstanding that the sufficiency thereof has never been challenged or put in issue.

With all due respect, it is deemed incredulous that either the Circuit Court or the District Court in the case at bar, could conceivably, after presumed required review of the record, reject in toto, Petitioner's constitutional claims of deliberate suppression of exculpatory evidence, wire tapping, perjury and falsification of records upon the singular and unsupported basis that the same had previously been "decided".

Certainly the record should speak the truth as to such "finding". Suffice it to say that *if* the Government is able to demonstrate in its response to the within Petition the conduct of *any* hearing upon Petitioner's claims or the existence of *any* proceeding in which the same were determined on the merits, the Petitioner would be content to accept, without further proceeding, the travesty of justice attendant to his conviction.

Realistically, if matters of such constitutional magnitude have, in fact, been "decided", there must at least be something in the record to demonstrate the same, beyond the mere terms "Denied" or "Affirmed", which have *summarily* been applied to *every* prior application made by Appellant in connection with his claims.

While noting in its opinion that the Circuit Court alluded to three presumed instances to support its determination that Petitioner's constitutional claims had previously been "decided", i.e., in "Petition for Rehearing", "Motion for New Trial", and "direct appeal therefrom" such reliance by the Court is totally repugnant to the record, viz:

(1) The record demonstrates that the cited "Petition for Rehearing" was not even filed *until after* the Circuit Court had summarily affirmed Petitioner's conviction on his original appeal.[3] Albeit, because the previously suppressed IRS transcript was discovered only by pure chance *during* Petitioner's appeal and no issue concerning the same had previously been raised,

[3]Summary judgment of Affirmance was entered *February 25, 1975;* Petition for Rehearing was filed *April 11, 1975.*

the Circuit Court expressly refused to even consider such matter, holding: (App. F)

> "Appellant also has filed a motion that the case be remanded for evidentiary hearing. The various grounds asserted are raised for the first time on appeal, on petition for rehearing, or in the motion itself, and we will not consider them. The motion is DENIED."

(2) The record further demonstrates that Petitioner's Rule 33 "*Motion for New Trial*" was *summarily* denied by the District Court, without evidentiary hearing, and indeed, without even, Government response thereto. (App. H).

(3) Similarly, and with respect to the "*direct appeal therefrom*" the record otherwise reflects that the Circuit Court *summarily* affirmed such denial by the District Court without hearing. 512 F.2d 814. (App. I).

Ergo, neither in the three instances cited in the Circuit Court's Opinion, nor elsewhere in the record is there found *any* basis whatsoever which could even remotely suggest that any of Petitioner's claims had previously been "decided" in the manner as mandated by 28 U.S.C. 2255.

Certainly, where as in the instant cause, each of the several grounds raised are sufficient per se, to require the vacating of Petitioner's conviction, neither the Circuit Court nor the District Court could possibly have previously "decided" such vital issues on the pleadings and briefs filed by the parties". *Fuentes vs. U.S.*, (C.C.A. 5th, 1972) 455 F.2d 911.

Significantly, the 9th Circuit in *Wallace vs. U.S.*, (C.C.A. 9th, 1972) 457 F.2d 547, decisively held that "since Appellant did not have an evidentiary hearing on his earlier petition, denial was not on the merits of his claim."

In the somewhat analogous case of *Sanders vs. U.S.*, supra, this Honorable Court interpreted the provisions of a Section 2255 application as the same related to prior proceedings seeking collateral relief. In *Sanders*, the Petitioner filed two motions under Section 2255 after a conviction on a bank robbery charge. Both motions were denied by the trial court and affirmed by the court of appeals without hearing. This Court granted certiorari and reversed the court of appeals, holding that the sentencing court *should have granted a hearing on the second motion.* Subpart A of this Court's opinion particularly addresses itself to the question of successive motions on grounds previously heard and determined, viz:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or Section 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application. (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." (at 1077).

Although in such instance, this Court did not specifically refer to a Rule 33 Motion for New Trial as presented in the case sub judice, its discussion of successive motions in general terms certainly suggests that

the rationale of the case applies to *all* successive motions for federal collateral relief:

> "No matter how many prior applications for *federal collateral relief* (emphasis added) a prisoner has made, the principle elaborated in Subpart A, supra, cannot apply if a different ground is presented by the new application. So, too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the *writ or motion remedy; and this the government has the burden of pleading.*" (at 17).

This court went on to set forth three criteria for finding successive motions to be res judicata:

> "By ground, we mean simply a sufficient legal basis for granting the relief sought by the applicant . . . identical grounds may often be proved by different factual allegations. So also, identical grounds may ofter be supported by different arguments . . . or vary in immaterial respects . . . Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant (at 1077.)

Concerning motions summarily denied, this court in *Sanders* specifically held:

> "The prior trial must have rested on the merits of the ground presented in the subsequent application. . . . This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing must be held." (at 1077).

Since a Rule 33 Motion is deemed to be a motion for federal collateral relief, and this court in *Sanders* made specific reference to motions for federal collateral relief, the rationale of such case should apply to the situation presented in the case at bar, wherein a Rule 33 Motion for federal collateral relief was followed by the 2255 Motion filed herein.

In cases involving successive Rule 33 motions, such as *Saunders vs. U.S.* (D.C. Cir. 1951) 192 F.2d 409, and *Wilson vs. U.S.*, (8th Cir. 1948) 166 F.2d 527, the *only time* that successive motions have been found to be res judicata was in instances where *a full hearing had been held* on the first motion, and the second motion was based *on identical grounds.* As noted, the lower court cases involving successive Section 2255 motions have reiterated the findings of this Court in *Sanders.*

In *Wallace vs. U.S.*, (8th Cir. 1949) 174 F.2d 112, the Eighth Circuit Court of Appeals reversed the denial of successive 2255 motions by the District Court, stating:

> "The action of the District Court upon the joint motion of Wallace and Story . . . to vacate their sentences cannot, we think, be regarded as res judicata of Wallace's present motion, since the record fails to show that the prior mo-

tion was heard upon the merits or that any formal order denying it was entered." (at 1177).

Also, in *Andrews vs. U.S.*, (5th Cir. 1961) 286 F.2d 829, the court found that a prisoner was entitled to a hearing upon a second motion attacking his sentence. In *Andrews* there had been no hearing on an earlier motion and the files and records of the court did not conclusively show that the prisoner was entitled to no relief. Further in *Haynes vs. Ciccone*, (W.D. Missouri, 1965) 248 F. Supp. 898, the Court held:

> "If the hearing on petitioner's prior motion under Section 2255 was not a full and fair hearing resulting in reliable findings, successive applications for relief under Section 2255 may be filed by the petitioner in the committing court . . . and rulings thereon appealed until a full and fair hearing and a lawful decision has been rendered, and until the ends of justice would not be served by reaching the merits of a subsequent application. (At 902).

Further, in *Saville vs. U.S.* (1st Cir. 1971) 451 F.2d 649, the First District Court of Appeals found that the district court had erred in relying on prior 2255 motion denials in its refusal to grant a hearing on a successive motion. The court stated that:

> ". . . prior refusal to discharge a prisoner on a like application can be given controlling weight only if it was an adjudication on the merits of the ground presented." (at (650)

In *Holt vs. U.S.*, (8th Cir. 1962) 303 F.2d 791, the Eighth Circuit Court of Appeals considered the propriety of both a Rule 33 motion and a Section 2255 Petition. As noted therein, while an appeal of a conviction for narcotic violations was pending, the defendant in *Holt* filed a Rule 33 Motion for new trial. The District Court summarily dismissed the motion because it felt that it was without jurisdiction to entertain the motion for new trial while an appeal of the conviction was pending. After the conviction had been affirmed by the court of Appeals, the appellant filed a motion under Section 2255 and in the alternative, reiterated his claim for a new trial under Rule 33. The Court of Appeals vacated the order of the district court dismissing the motion for new trial and remanded the cause for purpose of consideration of the Rule 33 motion along with the Section 2255 motion. The Court determined that it was necessary to conduct a *full* hearing on both of these motions — though subsequently denying the same on the merits.

It is accordingly submitted from the foregoing that where no hearing was had on a prior application for federal collateral relief, a subsequent 2255 motion embracing either the same or different grounds, *must* be heard and determined by the trial court — unless such latter motion conclusively shows that movant is entitled to no relief.

In *Kyle vs. U.S.* (CCA 2nd, 1961) 297 F.2d 507, the Second Circuit Court of Appeals considered a situation virtually on "all fours"' with the case at bar. In such case, the District Court denied a Section 2255 Petition where it was claimed that the Government had "sup-

pressed" certain let'ers of exculpatory value. In such instance,

> "The Government opposed the motion on the grounds that petitioner should have "raised and pushed" the issue earlier, that the copies of the letters would not have helped him in any event, and that if he had deemed them essential, he could have obtained the originals from Salzburg. Chief Judge Bruchhausen denied the motion with an oral opinion, rendered after argument but *without an evidentiary hearing.*" (Emphasis supplied)

In further alluding to the factual situation of such cause, the Court observed:

> "Here the appearance in the Government's files of the letters, the possession of which it had disclaimed at and after the trial, sufficiently altered the situation since the denial of the first motion to demand evidentiary inquiry . . ."

In noting that no evidentiary hearing had been held, the Court in *Kyle* remanded the cause and directed the conduct of such hearing if only to determine whether the Government's failure to disclose was wilful or negligent.

In applying such principle to the case at bar, it is noted that the Government denied the existence of certain extensions to file tax returns which Petitioner claimed had been both requested and granted. Aside from the exculpatory effect of such extensions, this

direct conflict in testimony materially and adversely affected Petitioner's credibility. Subsequent discovery made during the course of original appeal reflected not only the existence of at least one of the extensions claimed, but the Government's knowing possession and suppression thereof.

In affidavits filed before the Court (App. D and N) *both Petitioner and Petitioner's trial counsel, E. David Rosen, swore that the existence of such exculpatory exhibit was completely unknown to them at time of trial and further, that the Government had at no time disclosed or supplied the same.*

Moreover, and while Petitioner's Rule 33 Motion for New Trial made reference *only* to such singular extension, the 2255 Petition filed herein claimed both the existence and suppression of *other* exculpatory exhibits and extensions as well.

Significantly, neither the District Court nor the Circuit Court *ever entered* a finding that "the ends of justice would not be served by reaching the merits of the subsequent application" as required in *Sanders*, supra. Nor indeed, has either the Circuit Court or the District Court ever required the Government to either admit, deny, or otherwise respond to any of Petitioner's claims of Government misconduct . . . which, as of this date, the Government has totally failed to do.

Ergo, and aside from the absence of any predicate in the record to support the summary rejection of Petitioner's claims, even the authorities cited in the Circuit Court's opinion are viewed to be totally inapplicable, viz:

In *Del Genio vs. U.S.*, 352 F.2d 304 (5 Cir. 1965), the Court specifically determined that Petitioner's prior application had been given "an exhaustive evidentiary hearing covering the identical matters again asserted in the Section 2255 Petition".

In *Blackwell vs. U.S.*, 429 F.2d 514 (5 Cir. 1970), the Court specifically determined there was no factual predicate in the record to support Petitioner's Section 2255 claim that his confession had been "coerced" since no such confession had ever been received in evidence at trial of the cause.

It is significant to note that during proceedings on his 2255 motion to vacate, the Petitioner made the following unanswered challenge!

". . . to demonstrate from the record the existence vel non of any of the following:

(a) any pleadings or instruments wherein the Government either admits, denies or otherwise responds to the constitutionally impermissible claims raised herein by Petitioner,

(b) any proceeding or hearing heretofore held in the cause whereat any of the evidentiary matters reflective of Petitioner's claims was considered by this or any other court.

(c) any order, ruling or directive wherein it might appear that a determination of Petitioner's claims was rendered on their respective merits."

Neither the Government nor the District court met such challenge, apparently for the simple reason that none of the foregoing matters do, in fact, exist.

Petitioner accordingly submits that absent any prior determination of the constitutional grounds herein urged on their respective merits, the statutory requirements as prescribed by 28 U.S.C. 2255, make requisite the granting of an evidentiary hearing upon Petitioner's Motion to Vacate. Certainly, if, at such evidentiary hearing, the Petitioner can meet the requisite burden of proof supportive of his constitutional claims, he would clearly be entitled to the consequent vacating of his conviction. Only then, could the Petitioner be said to have had his "day in Court" in the manner envisioned by the late and revered Justice Black, who, in *Berman vs. United States*, (1964) 378 U.S. 530, admonished:

"The Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end; the achievement of equal justice for all. I have no doubt that the disposition of this case would have been very congenial to the climate of Baron Parke's day. I confess, however, that I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants."

Needless to state, the consistent refusal on the part of the lower courts to even allow a hearing upon Petitioner's constitutional claims is, to the absolute disgrace of our judicial system, reminiscent of "Watergate".

Certainly, and to the extent that Petitioner has been denied such a hearing, his constitutional right of equal protection under the law must be said to have been violated. Similarly, and with respect to the summary rejection of such claims, his additional constitutional right of due process was effectively denied.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

LOUIS VERNELL,
In Proper Person

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 13th day of February, 1978, to:

The Solicitor General
Department of Justice
Washington, D.C. 20530

LOUIS VERNELL